77-424

Supreme Court, U. S.
FILED
SEP 16 1977
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

October Term 1977

No. 77-1053
77-1054

ERNEST TUCKER and
GAIL ANN TUCKER

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ERNEST TUCKER and GAIL ANN TUCKER
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v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, ERNEST TUCKER and GAIL ANN TUCKER, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 17, 1977.

OPINION BELOW

No Opinion of the Court of Appeals was rendered. The Order appears in the Appendix hereto (App. 1(a)). No Opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 17, 1977. No petition for rehearing was filed and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

THE FAILURE OF THE TRIAL JUDGE TO RECUSE HIMSELF FROM HEARING THE CASE IS VIOLATIVE OF 28 USC §455, CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION AND DEMANDS REMAND FOR A NEW TRIAL BEFORE A DIFFERENT JUDGE.

II

THE PRESIDING JUDGE'S PREDETERMINATION OF GUILT INFLUENCED HIS CONDUCT OF THE TRIAL, CONFIRMING THE EXISTENCE

OF PARTIALITY AS WELL AS REQUIRING REVERSAL UNDER THE DUE PROCESS CLAUSE AND UNDER THE COURT'S SUPERVISORY POWER.

A

THE FAILURE TO GRANT A CONTINUANCE TO TRIAL COUNSEL RETAINED TWO WEEKS BEFORE THE TRIAL WAS AN ABUSE OF DISCRETION AND INDICATION OF BIAS.

B

THE FAILURE TO GRANT A CONTINUANCE SO THE DEFENDANT, ERNEST TUCKER, COULD RETAIN COUNSEL OF CHOICE WAS AN ABUSE OF DISCRETION AND AN INDICATION OF BIAS.

C

THE EXTENSIVE INVOLVEMENT OF THE JUDGE IN CROSS-EXAMINATION AND QUESTIONING OF WITNESSES WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

III

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY CONCERNING AN ESSENTIAL ELEMENT OF AIDING AND ABETTING: CRIMINAL INTENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; . . . nor shall be compelled in any criminal case to be witness against himself . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense.

United States Code, Title 18, §1341:

Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented

to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 18, §1342:

Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or devise mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 28, §144:

> Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

United States Code, Title 28, §455:

> Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

On July 13, 1976, Defendants-Appellants Ernest Lee Tucker and Gail Ann Tucker were indicted on a charge of 32 violations of 18 U.S.C. §§1341 and 1342, the federal mail fraud statutes, between January 1, 1974 and the date of the indictment. They pleaded not guilty to the charges in the indictment and were tried by jury in the United States District Court for the Southern District of New York, the Honorable Robert J. Ward presiding. At the conclusion of the government's case-in-chief, the prosecution voluntarily withdrew fourteen counts. On December 3, 1976, the jury returned a verdict of guilty on all the remaining eighteen counts for each defendant. Mr. Tucker was sentenced to five years imprisonment and Mrs. Tucker received a sentence of six months imprisonment and three years probation. No opinions were rendered by the Court below.

On August 17, 1977, the Court of Appeals affirmed without written opinion.

THE INDICTMENT

The alleged mail fraud scheme charged in the indictment began with the placing of advertisements in various national magazines to the effect that Ernest Tucker possessed a money-making secret from which he had earned thousands of dollars, which secret he would share with the public. To those who wrote for the secret and paid $10.00, a booklet was mailed explaining the business of selling fur novelties by mail. The government contended that the initial booklet was misleading and fraudulent, the mail order selling of fur novelties was an unsound business venture, a

fact of which the defendants were cognizant, and the defendants sole purpose in business was to make money from the ordering of brochures and mailing materials rather than through the establishment of a mail order novelty business.

The government attempted to establish its case by the presentation of twenty-four witnesses in its case-in-chief and two witnesses in rebuttal.

Letter-Handler-Collection Agents

Nine of the government witnesses consisted of individuals who had ordered materials from the defendants for the purpose of engaging in the mail order business after responding to advertisements in various periodicals. The testimony elicited from these witnesses dealt with their complaints ranging from failure to receive mailing materials, quality of brochures supplied, lack of success in obtaining orders, and failure to receive refunds.

Supplies

Three witnesses who had supplied Unique Ideas and Creative Giants with printed material testified that they supplied defendants with envelopes, brochures and letters. These witnesses further testified that they dealt with both Ernest Tucker and Gail Ann Tucker. Martin Balin, a printer, testified that he believed he was dealing with Ernest Tucker as principal.

Mailing Services

LEE EPSTEIN of the John Blair Marketing Co., MICHAEL T. ABBENE of Schedule Mailings, and SEBASTIAN MANGINI of Jetson Mailing, all

represented mail service firms which handled mailings for Unique and Creative Giants. These companies label, sort, insert and deliver mail to the post office for their customers. Mr. Epstein spoke with both defendants by telephone and received a purchase order signed by Gail Tucker. His company mailed 800,000 brochures for Unique. Mr. Abbene stated he spoke to Ernest Tucker on the telephone and mailed about 1,400,000 brochures in November, 1974 and January, 1975. Sebastian Mangioni states his firm received a purchase order signed by Gail Ann Tucker in February, 1975 for one and one half million booklets to be mailed on behalf of Creative Giants. The order was never completed.

Furriers

LIBBYE NYMAN and SONIA SHABASON testified as furriers who supplied fur novelties to Unique Ideas and Creative Giants. Mrs. Nyman created mink and sable roses. She met Mr. Tucker in 1970 and Mrs. Tucker in 1972, and during that time and into 1973, she sold approximately 70 - 800 floral pieces to the Tuckers. Sonia Shabason stated that both Mr. & Mrs. Tucker purchased fur novelty items such as necklaces, pocketbooks, earrings, bracelets, key-chains and bow-ties from her father who is a furrier. Payment was received from both Mr. & Mrs. Tucker.

Employees

Three employees who worked for Unique Ideas and Creative Giants testified for the government. These employees included the packing supervisor, Ernestine Washington, who handled 500 new orders daily and was instructed by both Tuckers to pack orders promptly and correctly; Lilly McCall, and Jannie McCall, a packer and complaint handler respectfully.

Further government testimony was elicited from Jack Gensler, C.P.A., the company's bookkeeper and Edmund Kinckle, a mail order businessman who was given advice by Mr. Tucker on how to make his business more profitable. He had given a testimonial that Tucker's method had been helpful to him in the mail order business in general.

Bankers

CHARLES HERSH, a banker with Chelsea National Bank, and ARTHUR J. McCLOSKEY, a banker for Manufacturer's Hanover Trust completed the government's presentation on direct. Each testified that Mr. Tucker had a company bank account with his bank. Mr. Hersh stated that the bank learned its name was being used in the advertisements and asked Mr. Tucker to discontinue doing so. Mr. Tucker agreed to desist. When the advertisements continued to appear, Mr. Tucker had a meeting with Mr. Hersh and the bank president. Mr. Tucker told them that no further ads would be printed, but those already printed would be used. An argument ensued and the bank closed the account in March, 1974.

Mr. McCloskey testified that his bank responded to inquiries about the company by asking Mr. Tucker to withdraw its name from the ad. Mr. Tucker stated the printing had already been mailed but the bank's name would be removed from future advertisements. Because the bank continued to get inquiries, the account was closed by them on January 31, 1975.

Post Office Investigators

On rebuttal the government presented two witnesses. JAMES STEPHENS, an inspector for the United States

Postal Service, said he read the ad and wrote to Ernest Tucker requesting the name of the C.P.A. He received a reply containing the name of Jack Gensler, but did not receive an address or a copy of the statement.

CHRISTINE M. MACHO, a United States Postal Service inspector assigned to the Unique Ideas case, testified she recommended that all mail to the defendants be stopped on January 31, 1975, and a stop order was subsequently issued by the office of the General Counsel in Washington, D.C. She stated that it was not the practice to notify defendants in advance of stop orders although the post office usually notified companies when initial complaints were received so that they would have a chance to correct them.

Defense Evidence

The defense evidence consisted of five witnesses. In testifying on their own behalf, both Ernest Tucker and Gail Ann Tucker testified that the advertisements were true statements, that they were involved in a legitimate endeavor and that they dealt with their customers in good faith.

Gail Ann Tucker further testified that she was only an employee of the business owned and controlled by her husband, Ernest Tucker.

Marie Laurence Janini an employee of Unique Ideas, also known as Marie Law testified that Mr. Tucker was the boss and Mrs. Tucker took orders from him

Testimony was also given by William Hecht and Phillip Boehm owners of companies who supply lists of potential buyers, that Ernest Tucker purchased lists of about three million names from them.

The last defense witness was Ernest Tucker. He testified that he made no intentionally misleading statements in his booklet and that his money-making method was a total concept. He based his belief of sales on the success of a pre-mailing test which was made and that he expected his agents to be as successful.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE TRIAL JUDGE TO RECUSE HIMSELF FROM HEARING THE CASE IS VIOLATIVE OF 28 USC §455, CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION AND DEMANDS REMAND FOR A NEW TRIAL BEFORE A DIFFERENT JUDGE.

On November 1, the Honorable Robert J. Ward met with attorneys Chance for the defense and Cutner for the prosecution in a pre-trial conference. The judge revealed a belief in the defendants' guilt by expressing surprise that the case was going to trial. He stated that he was familiar with the case, had read Ernest Tucker's rap sheet, and heard and saw some of the witnesses in the prior civil case:

> "THE COURT: I don't think it should take long. You know, I conducted a hearing in this case, and probably heard and saw some of the same witnesses. In fact, I'm curious about the defendants going to trial.
>
> I note two things: I note the record which was compiled at the prior hearing when Mr. Chance was not present, and I do have some awareness of the defendant's prior involvement with the law which, unfortunately for him, take up the better part of three pages of an FBI sheet, and I must suggest that if he wishes to go to trial that is his right, but I did hear some of the evidence in this case already from the victims."

Interestingly, he referred to the testimony of the "victims," revealing clearly his feelings as to the defendants' guilt [Transcript, Pre-trial conference Nov. 1, 1976, pp 7-8].

Defense counsel Chance, at that time representing both defendants, immediately requested that Judge Ward recuse himself. The judge denied the motion on claimed 28 U.S.C. §144 grounds stating it was too late to file an affidavit and motion. He also, despite his earlier comments, denied having any preconceived notions as to the guilt of the defendants [Transcript, Pre-trial conference, Nov. 1, 1976 pp 7-9].

Federal law on recusal is governed by two statutes, 28 U.S.C. §144 and now 28 U.S.C. §455. The earlier statute, §144, required the filing of a written motion supported by an affidavit signed by the defendant attesting to the personal bias of the judge against him. Numerous cases have held that the motion and affidavit should establish four aspects of bias: 1) The bias must exist in fact, innuendos are insufficient to meet the test; 2) The bias must be directed at the party-defendant, not at his attorney or the issues of the case; 3) The bias must be personal and not aimed at an entire class; 4) The bias must be extra-judicial in origin, thus not developed during the course of the pending litigation. *Lazafsky v. Sommerset Bus Co., Inc.*, 389 F.Supp. 1041 (E.D.N.Y. 1975); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), *United States v. Schlafani*, 487 F.2d 245 (2d Cir. 1973).

On December 5, 1974, 28 U.S.C. §455 was enacted into federal law. The relevant portion of the statute is as follows:

> (a) Any justice, judge, magistrate, shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of evidentiary facts concerning the proceeding; . . . .

This new statute directs a new attitude toward recusal of federal judges — one fully responsive to the ideal that ". . . justice must satisfy the appearance of justice." *See Offutt v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.).

—Section 455, as amended, worked a "drastic change"—

According to the House Judiciary Committee Report No. 93-1453, pp. 1 and 5, Public Act 93-512 was intended (1) "to broaden and clarify the grounds for judicial disqualification;" (2) to create an objective rather than a subjective standard for determining a judge's qualification to sit; and (3) to remove the "duty to sit" concept previously used to resolve doubts in favor of a judge's continuing to preside in a particular case. 1974 U.S. Cong. & Adm. News at 6351 and 6355. The requirement that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. §455 (a), thus ". . . makes a drastic change in procedure in the federal courts." 13 Wright, Miller & Cooper, *Federal Practice and Procedure* §3549 (1975). That work was cited in *Samuel v. University of Pittsburgh*, 395 F.Supp. 1275, 1277 (W.D.

Pa. 1975) where the court held that the 1974 amendment "changes the original Section 455 by liberalizing the disqualification procedure to favor the moving party. . . ."

—Remedial statute entitled to liberal construction—

> A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and generally is to be liberally construed.
> 28 C.J.S. "Statutes," §388 at p. 918.

Examples of remedial legislation include the Federal Securities Acts, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); long arm statutes, *McGee v. International Life Insurance Co.*, 335 U.S. 220 (1957), *Bagsarian v. Parker Metal Company*, 282 F.Supp. 766, 769 (N.D. Ohio 1968); and statutes relating to the disqualification of judges, *Application of Capuano*, 327 N.Y.S. 2d 17, 68 Misc. 2d 481 (N.Y. Co. Ct. 1971), People ex rel. *Union Bag and Paper Co. v. Gilbert*, 256 N.Y.S. 442, 143 Misc. 287, *aff'd*, 260 N.Y.S. 939, 236 App. 873 (Sup. Ct. 1932). According to the House Committee on the Judiciary, the purpose of the 1974 amendment was "to improve judicial machinery. . ." which sounds as "remedial" as one can get. And, remedial legislation is "entitled to a broad interpretation so that its public purposes may be fully effectuated." *Binkley Mining Co. v. Wheeler*, 133 F.2d 863, 871 (8th Cir. 1943).

—The appearance of impartiality test—

Under the new standard adopted in amended §455, an objective reasonable-man test is to be applied in determining a judge's qualifications to preside — i.e., if there are facts which might lead a reasonable man to question the

court's impartiality, he is not qualified. Committee Report, *supra* p. 5. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) the Court overruled the decision of a panel of arbitrators, one of whom had an undisclosed interest in one of the parties, even though no actual bias had been shown:

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.
>
> 393 U.S. at 150.

According to Professor Frank, in his testimony before the Senate Judiciary Committee, that standard is now part of §455(a). *Hearings on S.1064 before the Subcommittee on Improvements to Judicial Machinery of the Senate Committee on the Judiciary*, 93 Cong. 1st Sess. at 114 (1973).

—Judge Ward's impartiality was reasonably questioned—

In the instant case, it appears from the pre-trial conference that the judge had already decided upon the guilt of the defendants. This pre-judging of guilt came not from weighing the evidence in the case before him, from hearing the testimony, considering arguments and applying the law, but from conclusions drawn from an earlier civil suit involving the same defendant. In the words of the judge, he had already spoken to some of the "victims." (Trans. p. 7, Nov. 1, 1976).

The words and the legislative history of §455 are clear. Recusal is mandated where the judge finds himself "in any proceeding in which his impartiality might reasonably be questioned." How can a judge who apparently has already decided upon the guilt of the defendants, who has expressed his surprise that the defendants are bothering to go to trial, and who refers to prosecution witnesses as "victims" not give occasion to reasonable questions about his impartiality?

The problem is not that Judge Ward presided over the prior civil case. It is not just that he formed adverse opinions as a consequence. Rather, we confront a peculiar, critical problem here because the judge evidently could not restrain his opinions, allowed voice to his conclusions, thus filled the public record with the appearance of patiality — and supplied a reasonable factual basis for recusal. We, of course, refer to his pre-trial statement but note also that such is repeated and confirmed during the course of the trial (see argument Point II). Thus, neither the litigants nor the public could have full assurance of the integrity of the judicial process. This is essential — and this is precisely what amended §455 is supposed to guarantee. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n. v. Pollak*, 343 U.S. 451, 467 (1952) (Frankfurter, J.).

In conclusion, the judgment below should be reversed because Judge Ward abused his discretion by not recusing himself and by ruling on the question under the old standards of 28 U.S.C. §144 rather than under the liberal remedial standards of amended 28 U.S.C. §455.*

*Judge Ward's contention that the defense motion had to be denied because it was untimely made and in improper form demonstrates rigid adherence to §144 requirements. Section 455 rejected these rigidities. *See* 1974 U.S. Code Cong. & Adm. News 6351, 6358. It was meant to be self-enforcing by the presiding judge (as well subject to judicial review and appeal).

II.

THE PRESIDING JUDGE'S PREDETERMINATION OF GUILT INFLUENCED HIS CONDUCT OF THE TRIAL, CONFIRMING THE EXISTENCE OF PARTIALITY AS WELL AS REQUIRING REVERSAL UNDER THE DUE PROCESS CLAUSE AND UNDER THE COURT'S SUPERVISORY POWER.

Those courts which — under the standards of 28 U.S.C. §144 — have not found bias mandating recusal and thus remand for a new trial, have used as a secondary test for bias, the existence of prejudice in the conduct of the trial. *E.g., Voltman v. United Fruit Co.*, 147 F.2d 514 (2d Cir. 1945); *Winters v. Travia*, 495 F.2d 839 (2d Cir. 1974); *Wolfson v. Palmieri*, 396 F. 2d 121 (2d Cir. 1968). Assuming *arguendo* that recusal grounds under amended 28 U.S.C. §455 were not established by the presiding judge's own initial remarks noted in the previous argument, then it may indeed be appropriate to take a look at the trial itself. In *Wolfson v. Palmieri, supra*, the same judge presided at two different cases involving the same defendant and similar crimes. The court stated, 396 F.2d at 126:

> ". . . There should be a presumption that the trial court will conduct an errorless trial; that with skilled trial counsel in the case he will avoid participation in the examination of witnesses except in the interests of clarity; that he will not by demeanor indicate any personal or hostile attitude toward the witnesses or the case; that he will state fairly the issues in his charge.

Evidence that contradicts the above presumption of judicial impartiality bolsters and gives credence to the existence of bias and requires a new trial in accordance with the Fifth and Sixth amendments and in furtherance of the civilized administration of criminal justice.

(A) The Failure To Grant A Continuance To Trial Counsel Retained Two Weeks Before The Trial Was An Abuse Of Discretion And An Indication Of Bias.

On November 23, 1976, the attorney for Gail Ann Tucker appeared before Judge Ward and made a formal motion for a continuance. Mr. Richardson was retained by Mrs. Tucker at the insistence of the judge that the defendants be represented by separate counsel because of a possible conflict of defenses. (Pre-trial conference of November 1, 1976, p. 10). He filed a notice of appearance on November 12, 1976 and, although assuring the judge that he would make every effort to be ready for trial on November 29, 1976, reserved the right to ask for continuance if the time proved inadequate. In support of this motion, Mr. Richardson cited the voluminous material (more than 23 stacks of papers) which had been turned over to him by the attorney for Mr. Tucker and the government; the legal questions which he had not had adequate time to research such as the husband-wife relationship and its effect on criminal liability; the existence of witnesses whom he had not been able to interview. (Pre-trial conference of November 23, 1976, p. 3-4). Mr. Chance, attorney for Ernest Tucker, joined in the motion and added as grounds the need to investigate and obtain material in the hands of the carriers pertaining to counts four and five (he mistakenly stated three and four in the record) of the indictment. Judge Ward denied the continuance. After the prosecution rested, the attorneys for the defense again moved for a continuance before presenting their case. The motions were denied (Tr. 585)

The words of Judge Ward make it clear that he had no intention of allowing any delay in the trial. Even before the trial date was set, the attorney for the defense asked for as late a trial date as possible within the confines of the Speedy Trial provisions. The prosecutor indicated that the trial must start no later than January 1, 1977 and that this date would be suitable to him. The judge's answer to the defense's request was "I will put it down for the earliest date I can schedule it" (November 1, 1976 pre-trial conference, p. 7). Again, on November 10, 15 and 23, the court denied all requests for a continuance.

The right to a continuance, of course, is not absolute. Arbitrariness in denying a continuance, however, constitutes an abuse of discretion and denies due process and other trial rights. *United States v. Rosenthal*, 470 F.2d 837 (2d Cir. 1972); *Gavino v. McMahon*, 499 F.2d 1191 (2d Cir. 1974); *United States v. Wheeler*, 434 F.2d 1195 (9th Cir. 1970). *See also*, Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Indiana L. Rev. 711, 850-52 (1976).

In determining whether a continuance should be granted, courts have looked to such factors as good faith of the defense and the amount of time the defendant has been incarcerated awaiting trial. *United States v. Maxey*, 498 F.2d 474 (2d Cir. 1974).

The Court, the public and the defense, of course, have an interest in the unclogging of court dockets and the expeditious attention to questions which affect the future of each individual brought before the bar of justice.

> "[H]owever, speedy trial rules were intended to promote disposition of criminal charges with

> 'reasonable dispatch,' uninhibited by delays for which there is no good reason. They were never designed to permit a district court to ride roughshod over the right of a defendant to prepare for trial. Indeed they were aimed principally at prosecutorial delay. . . ." (Citation omitted).
>
> *Gavino v. McMahon*, 499 F.2d 1191, 1196 (2d Cir. 1974).

Time and again, the Courts have stated that the emphasis on speed should not outweigh the emphasis on justice — and justice can only poorly be served by an attorney who has had inadequate time to prepare a defense for his client. *Gavino v. McMahon, supra; United States v. Wheeler*, 434 F.2d 1195 (9th Cir. 1970); *Stans v. Gagliardi*, 485 F.2d 1290 (2d Cir. 1973); *Gadsden v. United States*, 223 F.2d 627; 96 U.S. App. D.C. 162 (1955), *cert. denied*, 350 U.S. 949.

Whether or not the failure to grant a continuance constitutes such abuse of discretion as to require a new trial depends upon the circumstances of each case. *United States v. Rosenthal*, 470 F.2d 837 (2d Cir. 1972); *Ungar v. Sarafite*, 376 U.S. 575,589 (1964); *United States v. Inman*, 483 F.2d 738 (4th Cir. 1973). In *Gavino, supra* the Indictment was filed in April, 1974, the defendant was arraigned in May, 1974 and trial was set for June 17. On June 7 the judge denied a motion for a new trial date despite the fact that defendant's counsel was engaged in a two-week murder trial, voluminous discovery materials had been turned over to the defense on June 3, numerous witnesses needed to be interviewed, and the prosecution had no objection to a continuance. On appeal, it was held that the court abused its discretion in denying a continuance. Likewise, in *Stans v.*

Gagliardi, supra, the court, while refusing to rule because an order setting a trial date is not appealable as a final order, nevertheless urged the judge to consider "the risk that overruling such a claim [of a need for a short delay] may undermine a conviction obtained after many weeks of trial." 485 F.2d at 1291. In *Stans,* discovery materials were turned over to the defense only 13 days prior to trial, the attorney argued he needed time to review the materials, to interview witnesses and to prepare a defense. *United States v. Uptain,* 531 F.2d 1281 (5th Cir. 1976) contains an exhaustive survey of Fifth Circuit rulings on factors to be considered in granting continuances. Relevant considerations are the amount of preparation time, the likelihood of prejudice, the defendant's failure to expedite the preparation, the complexity of the case, the availability of discovery, the adequacy of the defense presented, the experience of the attorney, length of the attorney-client relationship and representation by other counsel which benefits new counsel. 531 F.2d at 1286.

Bearing these factors in mind, there is much to the contention that the failure to grant a continuance as requested by both attorneys for the defense was an abuse of judicial discretion. The amount of time requested was minimal — at most four weeks. The attorney for Gail Tucker had only two weeks before trial started to prepare a defense. While it is true that he benefited to some extent from the preparation of Mr. Chance, there were avenues of defense which Mr. Chance had not explored, which potentially conflicted with the interests of Mr. Tucker, and which Mr. Richardson could not investigate because of the lack of time. Both attorneys moved for a continuance to subpoena witnesses and records they considered vital to the defense. The witnesses and records cited would help to establish the good faith of the defendants in mailing out materials to

their agents. The Court ruled such evidence would only be cumulative since the defendants and their employees had already testified to good faith. Yet, paragraphs four and five of the indictment focused on one aspect of the scheme being deliberate delay and the prosecution introduced at least seven witnesses and numerous exhibits to establish delay as an element of the scheme to defraud. Certainly it is arguable that the jury would have been favorably swayed more by post office and carrier records indicating mailings, than by the unsupported testimony of the defendants and their employees. If the defense had been allowed to refute this one aspect of the scheme, the jury might have been convinced of the lack of fraudulent intent throughout. Judge Ward's failure to grant a continuance to allow counsel — especially counsel retained two weeks before trial — time to prepare adequately for trial constituted an abuse of discretion requiring reversal.

Even if the failure to grant a continuance was not such an abuse as to mandate reversal, it is a weighty consideration when combined with other factors. *See United States v. Wheeler*, 434 F.2d 1195 (9th Cir. 1970). It is worth questioning whether the trial court's failure to grant a continuance was based on an impartial analysis of the situation or on his pre-determination that the defendants were guilty and therefore were not entitled to otherwise reasonable delay. Consider the court's emphasis on picking the earliest trial date possible. Consider the somewhat shocking colloquy where the judge informs Mr. Richardson that the prosecution goes first, thus giving the defense more time to prepare. Certainly an experienced trial judge is aware of the crucial importance of adequate preparation for cross-examination. If a defense begins only at that moment when the defense's case is called, it is unlikely that any real defense will be presented.

(B) The Failure to Grant A Continuance So The Defendant, Ernest Tucker, Could Retain Counsel Of Choice Was An Abuse Of Discretion And An Indication Of Bias.

Still another reason the court should have considered in deciding upon the motion for a continuance is the right to counsel of choice. At the pre-trial conference held on November 23, 1976 and during the course of the trial (Tr. 850-855), Mr. Tucker indicated strong dissatisfaction with his attorney and his approach to the defense of the case. Noting the conflicts between Mr. Tucker and his counsel, the judge gave the defendant three choices: 1) retain new counsel; 2) act as his own attorney; 3) retain Mr. Chance (Trans. November 23, pp. 24-25). These choices were in actuality no choice at all, since the court made it clear that no matter what decision, no delay would be granted to the new counsel.

The right to counsel in serious criminal matters is well established as one of the basic tenets of due process as guaranteed by the Sixth and Fourteenth amendments. *See, e.g., Gideon v. Wainwright,* 372 U.S. 335 (1963); *Argersinger v. Hamlin,* 407 U.S. 25 (1972). The right to counsel, comprehends the right to retained counsel of one's own choice and a reasonable opportunity to obtain their representation. *Chandler v. Fretag,* 348 U.S. 3 (1955); *United States v. Bragan,* 499 F.2d 1376 (4th Cir. 1974); *United States v. Sheiner,* 410 F.2d 337, 342 (2d Cir. 1969). *See also, Davis v. State,* 292 Ala. 210, 291 So. 2d 34 (1974). Judge Winter in his dissent in *Bragan,* 499 F.2d at 1381, expressed his strong feeling that the effectiveness of the attorney is not the issue; the real question is whether he is counsel of choice and if he is not, then due process has not been granted. (Citing *Davis v. State* with approval). Other

courts have viewed the failure to grant a continuance to obtain counsel of choice as a factor to be weighed in assessing the overall fairness of the trial. *United States v. Maxey*, 498 F.2d 474 (2d Cir. 1974); *United States v. Bragan*, 499 F.2d 1376 (4th Cir. 1974); *United States v. Uptain*, 531 F.2d 1281 (5th Cir. 1976)*.

In the instant case, the defendant, Ernest Tucker, expressed clear dissatisfaction with his attorney before the trial. The Judge insisted on treating this strong conflict as a trivial matter, brought up only for purposes of delay, and refused to give any serious consideration to the sheer impossibility of preparing an adequate defense when the attorney and his client are unable to work together. One can only question what harm a continuance would have done, especially when weighed against the important right being denied the defendant. And, again, we fear that the failure to grant a continuance was predicated on the judge's predetermination of the defendant's guilt, thus in his mind nullifying any need for the defendant to find an attorney who would represent him as he wished.

(C) The Extensive Involvement of the Judge in Cross-examination and Questioning of Witnesses was Prejudicial Error Requiring Reversal.

During the course of the trial, Judge Ward became extensively involved in the questioning of witnesses. Not counting the routine organizational type questions necessary for the conduct of a trial, the judge asked over 530 questions of the witnesses and defendants. (See Addendum

*Defendants-appellants specifically ask this Court to adopt Judge Winter's view and to overrule any contrary Second Circuit authority, if necessary.

for a complete list). At times, the judge became so involved in the questioning that it became difficult to separate him from the prosecution. He asked 81 questions of Jannie McCall, 46 of Arthur J. McClosky, 39 of Martin Selvin. Many of his questions were simply to clarify a statement; but many of his questions were an effective presentation of the elements of the prosecution's case. For example, it was the judge who asked many of the witnesses who testified as to their participation as an agent-mail handler, what method they used of communicating with the defendants, thus aiding the prosecution in establishing the use of the mail, an essential element of their case. (Tr. 134, 174-175, 207, 292).

By the time Ernest Tucker took the stand, the judge was actively participating in the cross examination. In addition to the 50 questions asked of Mr. Tucker, Judge Ward's comments and conduct reflected his impatience with the witness, his disbelief in his veracity, and his eagerness to terminate the trial.

In the presence of the jury, the judge stated to the defendant, Ernest Tucker:

The Court:	". . . I suggest that, the jurors being reasonable men and women who have taken their good judgment and common sense and brought it with them to the courthouse, I think they are just as well equipped to read this book as anybody's and if you want to explain something, Mr. Tucker, you go right ahead.
The Witness:	Okay.

The Court:	You say you are supposed to . . . I want to hear his explanation — you say the fellow reading the book, he starts at the front and continues to read. He gets to page 10. Is that right?
The Witness:	Yes, sir.
The Court:	Now, he gets to page 10. You say to understand what it says on page 10, you have to flip back. All right, you have to flip back, all right. Where do you flip back to?
The Witness:	What I'm saying, if I mention my money-making method on page 10 here, and I have described it on page 7, then when you read page 10, if you don't — if you haven't read previously what my method is, there can be some confusion.
The Court:	Taking the first nine pages, where is it where you describe what you call on the very first page, "My proven easy money method"? Where do you describe it in pages 1 through 9? Just show the jury and the Court."

(Tr. 786)

These are not questions of an impartial judge merely clarifying a point for the record. This is active, somewhat hostile questioning, almost defying the defendant to prove

his veracity and certainly revealing the judge's partiality to the jury. (It should be noted that in conference out of the presence of the jury, Mr. Tucker strenously objected to the bias he felt the judge exhibited by the above questions and statements. (Tr. pp. 865-868)).

Earlier the judge jumped into the questioning by Mr. Richardson to ask various questions about advertising of other items in the brochure, again assisting the prosecution in establishing its case (Tr. 793-94). Although made out of the presence of the jury, the exchange between Mr. Tucker and Judge Ward is revealing of the judge's view of the defendant. He accuses Mr. Tucker of scheming to delay the trial, of being aware of his own guilt and of doing anything to avoid the verdict. (Tr. 854-56). From here on the record is replete with examples of the judge's impatience to get the trial over with. He continually urges speed, and begins to cut off the defendant's answers and in some instances to answer for him (e.g. Tr. 930-31, 938). Losing his air of judicial impartiality completely, the court retorts to a remark made by the defendant "No, there is only one person around here who is not being wise, and I'm going to leave it to your imagination to determine who is who" (Tr. 933). When the defendant starts to answer a question, the judge states: "No, I know what your explanation is. We have heard it three times." (Tr. 933). Later, Mr. Tucker explained that the advertisement did not state the accountant's statement was signed in front of a notary. The judge interrupts: "I want to hear that answer again. I want to hear it read, and I want the jury to have this accountant's statement in front of them when they hear it." The prosecutor immediately indicates he will be happy to comply. (Tr. 943). Again the judge is assisting the prosecution and even without hearing the tone of the judge as he makes the above statement, his evident disbelief of the defendant is obvious.

At page 945, the Court again takes over the questioning of the defendant with questions tending not to clarify but to assist the prosecution in establishing guilt. When Mr. Tucker said he sent copies of the accountant's affidavit to those who asked for it, the Court defies him with: "Name one. Name one person to whom you sent that Gensler statement that's signed by your wife?" Again, at page 948, the Court demands: "You just name one investor, one of the people who sent in money to your firm to whom you sent this original document which was signed by your wife. Just name one." When Mr. Tucker objects that the question is unfair, the judge proceeds to ask if three more times before withdrawing it.

At page 970, the Court is again questioning the witness. When his answers are not specific enough, the judge impatiently states, "You can't stop, can you?" On pages 975-976 the judge and the defendant, in the presence of the jury, get into an argument over whether or not the defendant is intimidated. When Mr. Chance questions his client on re-direct, the judge in a lengthy exchange interrupts the questioning to lecture the attorney on asking a proper questions and acting like a lawyer. (Tr. 984). Again, the judge explodes completely, out of the presence of the jury. (Tr. 990). After a heated exchange in which the defendant insists on his innocence, Judge Ward emphatically replies: "I wouldn't take a plea of guilty from you . . . if it was your last breath." (Tr. 990). These are not the words of an impartial judge.

It has long been established that the role of a judge in the Federal court system is not that of a 'mere moderator'; he may "elicit testimony from witnesses, comment on the evidence to the jury, and limit the questioning of counsel." *United States v. Hill*, 496 F2d 201 (5th Cir. 1974). *United*

States v. Marzano, 149 F.2d 923 (2d Cir. 1945). The judge may ask questions which will assist the jury in understanding the evidence as long as he is careful to preserve an attitude of impartiality. *United States v. Natale*, 526 F.2d 1167, 1169 (2d Cir. 1975); *United States v. Cuevas*, 510 F.2d 848 (2d Cir. 1975); *United States v. Boatner*, 478 F.2d 737, 740 (2d Cir. 1973), *cert. denied*, 414 U.S. 818 (1973); *United States v. Pellegrino*, 470 F.2d 1205, 1206-07 (2d Cir. 1972) *cert. denied*, 411 U.S. 918 (1973); *United States v. Cheramie*, 520 F.2d 325 (5th Cir. 1975). As this Court stated, however, the judge must guard carefully against the appearance of partiality:

> "But he nonetheless must remain the judge, impartial, judicious, and above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. *United States v. Minuse*, 2 Cir., 114 F.2d 36; *Martucci v. Brooklyn Children's Aid Soc.*, 2 Cir., 140 F.2d 732; *United States v. Marzano*, 2 Cir., 149 F.2d 923."
>
> *United States v. Brandt*, 196 F.2d 653, 654 (2d Cir. 1952).

Where the judge merely asks questions designed to clarify issues presented by the pro ecution, *United States*

v. Natale, supra; United States v. Cheramie, 520 F.2d 325 (5th Cir. 1975); *United States v. Arroyave,* 477 F.2d 157 (5th Cir. 1973); *United States v. Jacquillon,* 469 F.2d 380 (5th Cir. 1972); *Singer v. United States,* 326 F.2d 132 (9th Cir. 1964); where he maintains an attitude of impartiality in his questioning and makes it clear to the jury that they are the final arbiters of all questions of fact and are not bound by his comments or questions, *United States v. Jacquillon, supra;* where any bias is exhibited out of the presence of the jury, *United States v. Schafani,* 487 F.2d 245 (2d Cir. 1973); *United States v. Arroyave, supra;* and where the judge's comments are directed to the attorney, not the defendant, and the judge so indicated by his statement to the jury, *Bush v. United States,* 267 F.2d 483 (9th Cir. 1959) the courts have held the bias was not adequate to mandate reversal. It is where the cumulative effect of the questioning, of the comments to the witnesses and of the judicial demeanor reach the point of possibly conveying to the jury the judge's alignment with the prosecution or predetermination of the defendant's guilt that he oversteps the bounds the permissible participation and necessitates reversal and remand for a new trial. *United States v. Cuevas,* 510 F.2d 848-850 (2d Cir. 1975).

In *United States v. Brandt, supra,* the court held that the cumulative effect of 900 questions asked by the court during the course of an 8-day trial, the nature of many of the questions, the active cross-examination by the judge, and the tone of many of his remarks all combined to deprive the defendant of a fair trial and thus require reversal. In *United States v. Fernandez,* 480 F.2d 726 (2d Cir. 1973), the judge participated unnecessarily in the cross-examination of several defense witnesses and asked such extensive questions during the prosecution's case that at one point before beginning to question a witness, the prosecu-

tion asked if the judge would like to begin the questioning. Additionally, and perhaps of controlling weight, was the questioning of one of the defense witnesses in which the judge's questions and remarks strongly indicated his disbelief of the witness. Such conduct by a trial judge departs from the role of impartiality a judge must play and requires reversal for a fair trial in accord with the demands of due process. *See also Williams v. United States*, 98 F.2d 685 (9th Cir. 1937) (extensive questioning in the nature of cross-examination and unnecessary sarcasm tending to belittle the defense); *Anderson v. Great Lakes Dredge & Dock Co.*, 509 F.2d 1119 (2d Cir. 1974) (extensive questioning of witnesses demonstrating hostility towards defense). While the judge may participate, "he should always be calmly judicial, dispassionate, and impartial." *Williams v. United States*, 93 F.2d 685-691 (9th Cir. 1937).

Improper judicial interference is not cured by a charge to the jury that they should disregard his remarks as they are the final determiner of the facts. *Williams v. United States, supra,* at 693; *cf. United States v. Jacquillon, supra.*

In the instant case the judge participated extensively in the questioning of the witnesses, cross-examined the defendant, Ernest Tucker, and the defense witnesses, denigrated the defendants and their attorneys with sarcasm, prejudicial statements and rulings and so thoroughly participated as a member of a prosecution team as to abandon his role of judge and forsake the "calm impartiality" required in a fair trial.

Again, we add in support of argument Point I, the judge was convinced of the defendants' guilt before the trial started, he allowed his belief to color his actions and he thus insured the conviction of the defendants. Points I and II, separately or combined, require reversal and remand for a new trial before a different judge.

III.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY CONCERNING AN ESSENTIAL ELEMENT OF AIDING AND ABETTING: CRIMINAL INTENT.

In charging the jury, Judge Ward charged on aiding and abetting as follows (Tr. 1146):

> "I turn now to aiding and abetting, a subject which I said I would return to later in my charge. It is not necessary for the government to show that a defendant physically committed the crime himself or herself. You will recall that Section 2 of Title 18, United States Code, which I read to you, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.
>
> Accordingly, you may find either defendant guilty of the offenses charged if you find that beyond a reasonable doubt that one defendant committed the offense and that the other defendant aided and abetted that defendant.
>
> To determine whether a defendant aided and abetted the commission of an offense, you ask yourself these questions: Did he or she associate himself or herself with the venture? Did he or she participate in it as something he or she wished to bring about? Did he or she seek by his or her action to make it succeed?
>
> If the defendant you are considering did this, then that defendant is an aider and abettor."

Defense counsel excepted to this charge specifically pointing out the Court's omission to instruct the jury concerning intent to aid and abet and specifically noting the requirement that aiding and abetting be done "knowledgeably" and be "willful" (Tr. 1146). The Court reviewed its charge and overruled the exception *(Id.)*.

The standard charge on aiding and abetting is contained in Devitt & Blackmar, *Federal Jury Practice & Instructions* §12.03 at 327 (1977 edition) as follows:

> "In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.
>
> An act or omission is "wilfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.
>
> You of course may not find any defendant guilty unless you find beyond reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission."

Crucial to the crime of aiding and abetting is the element of intent to bring about a criminal act. *United States*

v. Hernandez, 290 F.2d 86 (2d Cir. 1961); *Cellino v. United States*, 276 F.2d 941 (9th Cir. 1960); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938); *United States v. Barfield*, 447 F.2d 85 (5th Cir. 1971); *United States v. Barber*, 429 F.2d 1394 (3rd Cir. 1970). In *United States v. Newman*, 490 F.2d 139 (3rd Cir. 1973), the judge charged substantially the same as the judge in the instant case. The government unsuccessfully contended that the use of the word "participate" in the charge was indicative of criminal intent to satisfy the requirement of a charge on *mens rea*. The appellate court disagreed and reversed stating that wilfulness must specifically be charged in relation to aiding and abetting, not only in relation to the crime itself. *See also, United States v. Wisniewski*, 478 F.2d 274 (2d Cir. 1973).

Since much of the government's case against the defendant Gail Tucker was aimed at her participation as an aider and abettor, failure to charge on the crucial element of intent, could have led the jury to conclude that criminal intent to commit a crime was not essential and therefore to convict Gail Tucker for mere assistance and participation in the mail order business of her husband. This is especially true since the jury's verdict in no way indicated whether Gail Tucker was found guilty as a principal or as one who aided and abetted.

Both defendants were entitled to have their fates decided by a properly instructed jury and, therefore, their convictions should be reversed for a new trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit was mailed this 15th day of September, 1977, to:

ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
One St. Andrews Plaza
New York, New York 10007

/s/ ALBERT J. KRIEGER

ORDER OF THE COURT OF APPEALS
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

77-1053
77-1054

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and seventy-seven.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND

HON. WILLIAM H. WEBSTER
Circuit Judges

HON. JOHN F. DOOLING
District Judge

United States of America,
Plaintiff-Appellee

v.

Ernest Lee Tucker, Gail Ann Tucker,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By HOWARD J. GUARDARO,
Senior Deputy Clerk

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-424

In the Supreme Court of the United States

OCTOBER TERM, 1977

ERNEST TUCKER and GAIL ANN TUCKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BENJAMIN R. CIVILETTI,
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ERNEST TUCKER and GAIL ANN TUCKER, PETITIONERS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1977. The petition for a writ of certiorari was filed on September 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly declined to recuse himself.

2. Whether the trial judge's remarks and examination of witnesses denied petitioner a fair trial.

3. Whether the trial court properly instructed the jury on aiding and abetting.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of 18 counts of mail fraud, in violation of 18 U.S.C. 1341 and 1342. Petitioner Ernest Tucker was sentenced to five years' imprisonment. Petitioner Gail Ann Tucker was sentenced to concurrent terms of six months' imprisonment on each of nine counts and was placed on probation for three years on the remaining counts.

The sufficiency of the evidence is not in dispute. In 1974 and 1975, petitioners, husband and wife, operating as Unique Ideas, Inc. (Tr. 496-497; Exhibit 1, p. 21)[1], obtained money from the sale of advertising materials, mailing lists, and other mailing materials (Tr. 770) by falsely representing that these materials would enable the purchasers to operate successfully a mail order business in fur novelties (Tr. 259-274, 332-354; Exhibit 51, p. 8). They sold these materials for amounts up to $575, designating the purchasers as business "agents" (Tr. 259-274, 332-354; Exhibit 51, pp. 8, 11). The latter were to solicit orders for the novelties from the public, keeping half of the money received and remitting the balance to petitioners, who would mail the novelties to the consumer (Exhibits 8, 51).

Representations in a brochure that petitioner Ernest Tucker had earned $35,000 in a single day (Exhibit 8, p. 30; Exhibit 51, p. 2) and that "E.K.", a purported user of petitioners' "proven easy money method," had made over $2,000 in his first month of operations were false (Tr. 478-493). In fact, an accountant had refused to sign the

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[1] "Tr." designates the trial transcript. "Exhibit" designates the government's exhibits at trial. "Tr." preceded by a pre-trial conference date designates the transcript of such date's conference.

statement concerning petitioner's earnings because of inaccuracies (Tr. 461-467, 471-473) and "E.K." had never used petitioners' scheme at all. In addition, the brochure listed bank references without permission or knowledge of the banks (Tr. 437-456, 556-561; Exhibit 3, p. 2; Exhibit 51, p. 2).

The vast majority of "agents" received no orders from the public for the fur novelties (Tr. 81, 185, 208, 232-233, 281). Others who ordered and paid for petitioners' sales material did not receive it (Tr. 217-220, 297-300, 320-321). Although petitioners shipped millions of advertisements intended for the public to the "agents," they purchased only a few hundred fur novelties from the manufacturer for resale to the public (Tr. 402-415, 418, 499-514, 802). In short, the evidence showed that petitioners had sold their victims sales material containing false representations of profits to be made from products that the petitioners never expected the public to buy.

ARGUMENT

1. Petitioners, relying on remarks made by the trial judge at a pretrial conference, claim that the judge should have recused himself. This contention was properly rejected by the courts below.

At that conference, the trial judge, who had sat in a related civil trial, stated that he was "curious" about petitioner Ernest Tucker going to trial, that it was his right to go to trial, but that the judge had heard "some of the evidence in this case already from the victims." At this point defense counsel stated that "the defendant has indicated to me that he would hope that I would make a motion * * * that this matter might be assigned to some other judge because of the fact that you had heard the previous trial and the previous evidence in this case." The

trial judge, after noting that such a motion should have been made earlier, stated "If there is some factual presentation which you wish to make short of the fact that I merely presided previously, then I expect that your client will say so in affidavit form." The judge also said that he had never seen either of the petitioners, that he had "no preconceived notions of anything other than what [he had] already written," and that each defendant would come before the court with the presumption of innocence (Pre-trial Conference of 11/1/76 Tr. 7-9). Petitioners never filed any ~~no~~ affidavit or motion for recusal.

At the outset, petitioners face a severe procedural obstacle, since they apparently abandoned their request for recusal when asked by the district court to submit it in affidavit form. No further request for recusal was forthcoming in any form, either by written affidavit as prescribed by the court or by oral renewal of the recusal request. This omission by petitioners is plainly fatal to any possible claim under 28 U.S.C. 144, which explicitly requires an affidavit of prejudice. While 28 U.S.C. (Supp. V) 455, on which petitioners primarily rely, contains no such express requirement—and it is therefore arguable that an oral motion would ordinarily suffice to raise a claim under that provision—petitioners' failure either to adhere to or object to the court's direction regarding the procedure for presenting the claim is fairly construed to reflect abandonment of the issue in the circumstances of this case.

In any event, petitioners were not entitled to the recusal of the district judge in this case on account of his prior handling of a related civil matter and his comments at the pre-trial conference. It has long been settled that a disqualifying bias ordinarily "must stem from an extrajudicial source" and not from the fact that a judge

presided at a related case or acquired information in his judicial capacity. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583; *United States* v. *Haldeman*, 559 F. 2d 31, 131-139 (C.A. D.C.), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933; *United States* v. *Partin*, 552 F. 2d 621, 636-639 (C.A. 5), certiorari denied, October 17, 1977 (No. 77-34). While Section 455 was amended and broadened several years ago, it remains true under the current statute that ordinarily only extrajudicial matters will supply a basis upon which "impartiality might reasonably be questioned" (28 U.S.C. (Supp. V) 455(a)) or "personal bias or prejudice" (28 U.S.C. (Supp. V) 455(b)(1)) might be inferred. See *United States* v. *Wolfson*, 558 F. 2d 59, 62 (C.A. 2).

The basis upon which petitioners question the district court's impartiality in this case is that the judge "formed adverse opinions as a consequence" of his involvement in the earlier case, mentioning particularly his reference to the persons allegedly defrauded by petitioners as "victims" (Pet. 19). Not only is it clear that this statement had no extrajudicial basis, but the indictment described a scheme in which people put up money on the basis of material misrepresentations and then lost their investments, *i.e.*, were victimized. While the allegations of the indictment were of course not proved at the time of the pre-trial conference, and the judge was perhaps slightly careless in failing to refer to the prospective prosecution witnesses as "alleged" victims, his statements cannot reasonably be construed to reflect bias, and petitioners fail to cite a single case suggesting that recusal is appropriate in factually similar circumstances.

2. Petitioners next contend (Pet. 21-35) that the trial judge's refusal to allow a continuance and his questioning of witnesses were an abuse of discretion and an exhibition of prejudice. These contentions are without merit.

a. On November 1, 1976, the court directed petitioner Gail Tucker to obtain separate counsel because her interests might conflict with those of her husband. On November 9, both petitioners filed affidavits waiving any prejudice that might result from such a conflict. The next day, the court again ordered that Mrs. Tucker obtain separate counsel, making it clear to counsel who then represented both petitioners that separate counsel should be informed that trial was to commence on November 29. On November 15, when a new attorney appeared for Mrs. Tucker, the court advised him that trial was scheduled to commence on November 29 and that it would consider an application for a continuance based on good cause after counsel began trial preparation (Pre-trial Conference of 11/15/76 Tr. 11). On November 23, when counsel asked for a continuance, the court found that his reasons were inadequate but said it would grant a continuance during the trial itself if necessary (Pre-trial Conference of 11/23/76 Tr. 10-13). At trial, which began on November 29, counsel for Mrs. Tucker did not request a continuance. In these circumstances, where counsel had at least two weeks to prepare for trial, the ruling of the trial court was neither an abuse of discretion, see *Ungar* v. *Sarafite*, 376 U.S. 575, 589-590, nor a reflection of bias.

Petitioner Ernest Tucker's claim (Pet. 27) that the court acted out of bias in refusing to grant him a continuance so that he might retain counsel of his choice also lacks substance. The stated purpose of his request for a continuance was to give his original counsel more time for preparation; at no time did petitioner state, as he does here, that he wished new counsel (Pre-trial Conference of 11/23/76 Tr. 23-24). Petitioner had had the same counsel for four months, and the court properly refused to countenance any further delay. *United States* v. *Calabro*, 467 F. 2d 973, 986 (C.A. 2), certiorari denied, 410 U.S.

926. See also *Allen* v. *United States*, C.A. 6, No. 76-2564, decided April 26, 1977, certiorari denied, October 3, 1977 (No. 76-6781).

b. The record does not support petitioners' charge that the trial judge became so involved in the questioning "that it became difficult to separate him from the prosecution" (Pet. 29). A full reading of the record reveals that the judge acted correctly to control the progress of the trial and clarify the evidence. Moreover, the judge permitted petitioner Ernest Tucker to interrupt the prosecutor's cross-examination in order to speak at length of his innocence directly to the jury (Tr. 876-893). The court exercised extreme patience as it repeatedly struck from the record petitioner Ernest Tucker's nonresponsive and evasive answers (Tr. 785, 799, 800, 802-803, 805, 807, 842, 844-845, 903, 909-910, 911, 913, 914, 920, 922, 924, 929, 932, 933, 940, 942, 952, 953, 958, 976, 986, 1003-1004). Although petitioners accuse the judge of asking "hostile" questions about petitioners' brochure sent to prospective "agents" (Pet. 30), the judge was merely trying to direct the jury's attention to a particular page so that they could follow petitioners' explanations (Tr. 783-797).

Finally, petitioners cite out of context (Pet. 31) a statement by the court to support an argument that the judge cut off petitioner Ernest Tucker's answer. Tucker had repeatedly refused to testify whether he had denied refunds to complaining customers (Tr. 932-933):

> THE WITNESS: Could I answer with an explanation?
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> THE COURT: No, I know what your explanation is. We have heard it three times. Mr. Cutner is entitled to an answer to his question, and then appropriate arguments can be made to the jury. Did you or did

> you not give a refund on the mailing materials? Yes or no. If you can't answer the question yes or no, you may say, "I cannot answer that question yes or no."
>
> THE WITNESS: I cannot answer that question yes or no, without misleading the jury.

In sum, the record falls far short of demonstrating "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar* v. *Sarafite*, 376 U.S. 575, 588.

3. Petitioners argue (Pet. 36-38) that the trial judge failed to instruct the jury properly on the mental intent necessary to a conviction of aiding and abetting. However, the court delivered (Tr. 1135) substantially the same charge approved by this Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619:[2]

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." [Citation omitted.]

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[2]Petitioners' claim (Pet. 38) that the charge delivered was "substantially the same" as the charge found to be erroneous in *United States* v. *Newman*, 490 F. 2d 139, 143 (C.A. 3), is without merit. There the charge failed to specify that, in order to convict, the jury must find that the defendant "participated in a substantive crime with the desire that the crime be accomplished" (emphasis omitted).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1978.

DOJ-1978-01